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5 **UNITED STATES DISTRICT COURT**
6 **SOUTHERN DISTRICT OF CALIFORNIA**
7

8 NICHOLAS P. STEIN,

9 Plaintiff,

10 vs.

11 THE CITY OF CORONADO; AARON
12 MANSKER; CPO (CORONADO POLICE
13 OFFICER) BAUTISTA; KEITH JAMES;
14 CPO GILMAN; CPO WALKER; MARK
15 PORTER; CPO MCGEHEE; CPO
O'NEILL; MARY ANN CASTELLANO;
JEROME TORRES; CPO MURDOCH;
CPO AYRES; and DOES 1 through 10,
inclusive,

16 Defendants.
17

CASE NO. 11CV2362-LAB (RBB)

**ORDER DENYING DEFENDANTS'
MOTION TO DISMISS WITHOUT
PREJUDICE**

18 Nicholas Stein originally filed this lawsuit in San Diego Superior Court, naming the City
19 of Coronado and 12 police officers and dispatchers as Defendants. The Defendants
20 removed it to this Court because Stein's complaint mentions 42 U.S.C. § 1983, the
21 implication being that at least one of Stein's claims arises under federal law. (See Notice of
22 Removal ¶ 3.) But Stein's amended complaint alleges only state law claims: (1) negligence;
23 (2) battery; (3) assault; (4) intentional infliction of emotional distress; (5) false imprisonment;
24 and (6) abuse of process. It explicitly says "[t]his is a state court action with state common
25 law causes of action for negligence, assault, intentional infliction of emotional distress,
26 battery, false imprisonment, and abuse of process." (FAC ¶ 36.)

27 When Stein does mention § 1983 in his complaint, he seems not to understand that
28 it "is not itself a source of substantive rights, but merely provides a method for vindicating

1 federal rights elsewhere conferred.” *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (internal
 2 quotations omitted). In fact, he seems not to understand § 1983 at all. First, he suggests
 3 it gives rise to a general duty of care. (FAC ¶ 35.) Second, he suggests it “sets forth”
 4 constitutional rights. (FAC ¶ 37.) Third, he suggests it is a California law. (FAC ¶ 41.) None
 5 of these things is true, and the fact that Stein’s named claims arise only under state law
 6 causes the Court to question whether there really is a § 1983 claim here. And that, of
 7 course, causes the Court to question its own jurisdiction. *See Mt. Healthy City Sch. Dist. Bd.*
 8 *of Ed. v. Doyle*, 429 U.S. 274, 278 (1977) (holding that courts are “obliged to inquire *sua*
 9 *sponte* whenever a doubt arises as to the existence of federal jurisdiction”); *B.C. v. Plumas*
 10 *Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999) (“But federal courts are required *sua*
 11 *sponte* to examine jurisdictional issues . . .”).

12 “A § 1983 plaintiff must demonstrate a deprivation of a right secured by the
 13 Constitution or laws of the United States, and that the defendant acted under color of state
 14 law.” *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003). “The first step in any such claim
 15 is to identify the specific constitutional right allegedly infringed.” *Albright*, 510 U.S. at 811.
 16 And this is where Stein’s complaint is obviously deficient. Even if he intends to state a §
 17 1983 claim, it’s unclear what the constitutional deprivations are that are the basis of it. On
 18 one reading, they are violations of his Fifth and Fourteenth Amendment rights:

19 The Defendants owed a Duty of Care to Plaintiff under California
 20 Civil Code 52.3, Title 42 U.S.C. § 1983, and the Fifth and
 21 Fourteenth Amendments to the Constitution of the United
 States

22 As set forth herein, none of the Petitioner’s California and U.S.
 23 Constitutional Rights expressly set Forth in California Civil Code
 24 Section 52.3, Title 42 U.S.C. sub section 1983 or the Fifth and
 Fourteenth Amendments to the Constitution of the United States
 were preserved or protected at the time of the incidents, which
 serves as the basis for this action.

25 (Compl. ¶¶ 35, 37.) If this is Stein’s intent, to base a § 1983 claim on his Fifth and
 26 Fourteenth Amendment rights being violated, the Court presumes he means to allege that
 27 the Defendants denied him of liberty and property without due process under both
 28

1 Amendments, and that they denied him equal protection under the Fourteenth Amendment.

2 The problem is that he makes no effort to plead facts specific to these claims.

3 The Court could also look to Stein's named claims, all of which arise under California
4 law, and determine whether the alleged facts behind them would also constitute a violation
5 of his constitutional rights such that a § 1983 claim is plausible. For example, Stein's second
6 cause of action, for battery, alleges the use of unreasonable and excessive force in detaining
7 him, and "[c]laims for excessive force are analyzed under the Fourth Amendment's
8 prohibition against unreasonable seizures." *Young v. County of Los Angeles*, 655 F.3d 1156,
9 1161 (9th Cir. 2011). So, it's conceivable that in stating a claim for battery Stein also meant
10 to state a § 1983 claim based on a violation of his Fourth Amendment rights.

11 This won't work, however, for all of Stein's claims, some of which cannot also be
12 maintained under § 1983. For example, "[i]ntentional infliction of emotional distress is a state
13 tort claim, and therefore is not remediable under § 1983" *Corothers v. Salinas Valley*
14 *State Prison*, 2011 WL 2415631 at *2 (N.D. Cal. June 15, 2011). As for Stein's abuse of
15 process claim, "[i]t is unclear whether an abuse of process claim may even be maintained
16 under 42 U.S.C. § 1983, since abuse of process is a state law tort." *Alston v. Tassone*, 2012
17 WL 2377015 at *12 (E.D. Cal. June 22, 2012). Similarly, "[a] claim for wrongful detention or
18 false imprisonment, absent a cognizable claim for wrongful arrest, will not ordinarily state an
19 independent claim under § 1983." *Fonua v. City of San Mateo*, 2011 WL 2433040 at *4 (N.D.
20 Cal. June 13, 2011). And finally, it is hard to see how negligence could rise to the level of
21 a constitutional rights violation that is cognizable under § 1983. *See County of Sacramento*
22 *v. Lewis*, 523 U.S. 833, 849 (1998) (recognizing holding that "the Constitution does not
23 guarantee due care on the part of state officials; liability for negligently inflicted harm is
24 categorically beneath the threshold of constitutional due process"). That leaves only two of
25 Stein's six claims—battery and assault—that are cognizable under § 1983, and as violations
26 of the Fourth Amendment at that.

27 The bottom line here is that the Court questions Defendants' statement in their
28 removal notice that Stein alleges a deprivation of civil rights under § 1983. Stein does

1 incorporate § 1983 into his complaint, to be sure, but it's very clear that he doesn't
 2 understand exactly what § 1983 does, and as a result it's unclear that he actually intends to
 3 bring a § 1983 claim. On the other hand, if Stein does intend to bring a federal claim under
 4 § 1983, it's completely unclear to the Court, and probably to Defendants, which particular
 5 federal rights he believes Defendants have violated.¹

6 With the mere existence of a § 1983 claim uncertain, the Court can't proceed much
 7 further, given that its jurisdiction hangs on such a claim. Defendants' motion to dismiss is
 8 therefore **DENIED WITHOUT PREJUDICE**. Within two weeks of the date this Order is
 9 entered, Stein must either: (1) file a Second Amended Complaint that adds a seventh cause
 10 of action for violation of § 1983 (and makes no other changes), explaining in detail what the
 11 basis of the claim is; or (2) file a notice that he has no intention of bringing a § 1983 claim
 12 and wishes to proceed only with the six state law claims listed in his complaint. If he chooses
 13 (1), Stein is only to add a § 1983 claim to his causes of action; he is not to modify any other
 14 portion of the complaint. The Court will then reconsider Defendants' arguments for dismissal
 15 of the claim, and if persuaded by those arguments it will dismiss the claim and remand this
 16 case to San Diego Superior Court. See *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1000 (9th
 17 Cir. 1997) (recognizing that district courts may decline to exercise supplement jurisdiction
 18 over state law claims when federal claims are dismissed before trial). If Stein

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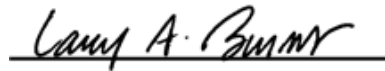
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 23 ¹ Stein's opposition to Defendants' motion to dismiss only muddies the picture.
 24 Initially, Stein asserts a claim under *Monell*, which is a particular kind of § 1983 claim that
 25 Stein's complaint doesn't contain a hint of. He also alleges Fourth Amendment and Eighth
 26 Amendment violations under federal law and a trespass violation under state law, all of which
 27 are new. In short, Stein's opposition is barely responsive to Defendants' motion to dismiss,
 28 and while it does mention "federal claims" it fails to shed any light on whether he is in fact
 asserting a § 1983 claim and, if so, what the basis of that claim is. In places, Stein's
 opposition is just completely off. For example, he cites the California Code of Civil Procedure
 and argues that Defendants' motion to dismiss must be denied because he didn't receive 75
 days notice. He also includes an "Authority" section that contains only what appear to be
 lengthy excerpts from other judicial opinions, without explaining what their relevance is to
 Defendants' arguments or why he is including them in his analysis.

1 chooses (2), the Court will remand this case for an obvious lack of subject matter jurisdiction,
2 and again, Stein can return to San Diego Superior Court to pursue his claims.

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4 **IT IS SO ORDERED.**

5 DATED: September 25, 2012

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8 **HONORABLE LARRY ALAN BURNS**
9 United States District Judge
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